United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-5009

To be argued by
ELIAS MANN

In The

United States Court of Appeals

For The Second Circuit

In re

UNISHOPS, INC., MIDDLETOWN CENTER, INC.,

Debtors.

143 ESTATES, INC.,

Appellant,

vs.

UNISHOPS, INC., MIDDLETOWN CENTER, INC.,

Appellees.

On Appeal from an Order of the United States District Court for the Southern District of New York.

BRIEF FOR APPELLEES

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Docket No. 76-5009

In re

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143 ESTATES, INC.,

Appellant,

-v-

UNISHOPS, INC.,
MIDDLETOWN CENTER, INC.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLEES' BRIEF

Preliminary Statement

The landlord, 143 Estates, Inc., of premises formerly occupied by Middletown Center, Inc., Tenant-Appellee, appeals

from an order of District Judge Marvin Frankel* (a) affirming in part Bankruptcy Judge Roy Babitt's order dated August 6, 1975, which reclassified a claim of $417,000 from an administrative to a general claim, and (b) reversing in part the order which allowed Claim No. 3 for $42,000 as an administrative claim and (c) remanding a third claim to the Bankruptcy Court for further proceedings.

QUESTIONS PRESENTED

(1) Are unpaid rent charges under a lease which accrued between the date of the filing of a petition for an arrangement under Chapter XI by a tenant-debtor and the date of the entry of a Bankruptcy Judge's order rejecting a lease administrative expenses, when the premises in question were surrendered prior to the filing and were unoccupied by the debtor-tenant during this period?

(2) Are unpaid rent charges under a lease guaranteed

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* Appellant-Landlord has not printed an appendix. Pursuant to an order of this court, it was permitted to reproduce "parts of the record relied on by the Appellant". The Opinion and Order of Judge Frankel are part of that reproduction, but it is difficult to refer to any particular page, as they are not numbered. Such reproduction will be referred to hereafter as "reproduction".

by debtor-guarantor entitled to priority status as an administrative claim because the unpaid rent accrued subsequent to the guarantor's Chapter XI proceedings, but prior to the debtor-lessee's Chapter XI proceedings?

STATEMENT OF FACTS

On July 1, 1970, White's at Middletown, Inc., a wholly-owned subsidiary of White Department Stores, Inc. (formerly White of Massapequa, Inc., and hereinafter "White") owned and developed the Middletown Shopping Center in New York (Agreed Statement of Facts ¶2, ¶4).* The parcel was leased to Middletown Center, Inc. ("Middletown"), a wholly-owned subsidiary of White (Facts ¶4, ¶5). Unishops, Inc. ("Unishops") subsequently acquired all the capital stock of White (Facts ¶6).

On September 24, 1970, claimant-appellant became the fee owner of the Shopping Center and obtained from Unishops a guarantee of Middletown's lease (Facts ¶3, ¶8).

On November 30, 1973, Unishops (sometimes referred to as "guarantor") filed its petition for an arrangement under Chapter XI (Facts ¶10). Middletown (sometimes referred to as "tenant") filed its Chapter XI petition on September 3, 1974 (Facts ¶15). Simultaneously with Middletown's filing, the keys to the premises were mailed to the landlord and retained by it (Facts ¶16). Tenant Middletown had ceased operations at the premises prior to September 3, 1974, and disposed of its property on the premises (Facts ¶17), although part of the premises leased remained in possession of a subtenant. (Facts ¶19).

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* Hereinafter referred to as Facts ¶__, as set forth in Reproduction.

On October 3, 1974, Bankruptcy Judge Roy Babitt entered an order pursuant to §313(1) of the Bankruptcy Act [11 U.S.C. §713(1)] rejecting and disaffirming Middletown's lease with the landlord and directing the payment to the landlord of "any and all rent received from such sub-lessees subsequent to the filing of the Chapter XI petition herein, on September 3, 1974" (Facts ¶21 and Appellees' Appendix A)* No collections of any rent were in fact received by appellees subsequent to September 3, 1974 (Facts ¶23).

DEPARTURES FROM THE RECORD IN APPELLANT'S BRIEF

Appellant's brief cavalierly fails to reference its factual allegations to the record** This gives appellant wide latitude to make imaginative improvements in the record. Some of the major departures from the record follow:

1. In stating benefits accruing to the guarantor Unishops, the landlord states:

> "(4) Continued accrual of rentals under sub-leases from some six sub-lessees as well as from Chemical Bank..." Appellant's Brief at 4.

There is no reference to the record. A review of the record discloses Facts ¶14 and ¶23, which state that rent may have been collected from one sub-tenant; and Facts ¶19, which

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* Record, Document #21

** At times even the Reproduction differs from the actual record. Cf. Document #27 (Stipulation of Facts) with the Reproduction. Facts ¶¶ 11, 14 and 23 of the Reproduction are taken from the first draft of an unsigned Stipulation of Facts.

shows the presence of a second sub-tenant.

2. "...Four consecutive months of payment of rent by DIP UNISHOPS constitutes its adoption in its capacity as DIP of the guaranty by conduct...." Appellant's Brief at 24; see also at 2. Again, there is no reference to the record. The record, Facts ¶12, indicates only that no rent was paid for the premises subsequent to February 1974, and shows a White's check for March 1974 rent that was stopped. This check is obviously not a Unishops debtor in possession check.

3. Appellant infers that Unishops received $4 million (the purchase price of the fee) as consideration for its guaranty. Appellant's Brief at 16. This is not even remotely supported by the record, which indicates that the former owner of White, Murray Nemeroff, was the owner of the fee at the time of appellant's purchase thereof. Facts ¶6. In fact, the deed, part of the record, Facts ¶7, indicates the transfer of the fee by Nemeroff to appellant.

4. Middletown's sub-tenant, Chemical Bank, attorned only to Unishops. Appellant's brief at 4. The record is devoid of any mention of Chemical Bank other than its continued occupancy of a portion of the premises. Facts ¶19.

5. "(3) Receipts derived by DIP UNISHOPS from active operation of its subsidiary, White's...between November 30, 1973 and May 1974 when active business operations continued unabated in claimant's premises...." Appellant's brief at 4. There is no legal relevancy to this purported fact and no basis for it in the record. There is nothing in

the record to indicate that White had a positive cash flow at the time in question and nothing to indicate Unishops' use of assets belonging to White.

THE CLAIMS IN QUESTION

1. Administration Claim No. 3 in the sum of $42,050 filed against Middletown, the debtor-tenant, representing rental charges accruing between the dates of Middletown's Chapter XI (September 3, 1974) and the return date of the motion to reject and disaffirm the lease. (September 23, 1974).

2. Administration Claim No. 2304 for $417,000.47 filed against Unishops, the debtor-guarantor*, for rentals owed by Middletown from March 3, 1974, to September 23, 1974.

3. Claim No. 2305** in an undetermined amount, against Unishops for rentals purportedly collected by Unishops in September 1974.

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* Unishops was the owner of all of the capital stock of White, which in turn was the owner of all of the capital stock of Middletown.

** The appeal is not concerned with this claim. The issues have been remanded by Judge Frankel to the Bankruptcy Judge.

POINT I

CLAIM NO. 3 FOR $42,000.00 FILED AGAINST THE DEBTOR-TENANT MIDDLETOWN, REPRESENTING RENTAL ACCRUING SUBSEQUENT TO THE CHAPTER XI OF THE TENANT, IS A GENERAL CLAIM AND NOT AN ADMINISTRATIVE CLAIM

Claimant-landlord would have this court elevate its claim to an administrative status merely because it accrued subsequent to the tenant's Chapter XI, even though the tenant had surrendered possession prior to its arrangement proceedings. Such argument must fall in light of this Circuit's reasoning in American Anthracite & Bituminous Coal Corp. v. Leonardo Arrivabene, S.A., 280 F.2d 119 (2nd Cir. 1960), holding that the claimant must show benefit accruing to the estate.

> "...The claim of a creditor having an executory contract with the debtor at the time the debtor's petition is filed is entitled to priority under these provisions [§64(a)(1) of the Bankruptcy Act] only if the trustee or debtor in possession elects to assume the contract or if he receives benefits under it... " 280 F.2d at 124.

It is clear from the stipulated facts at bar that Middletown rejected the executory contract in question* by order dated October 3, 1974, and therefore did not assume the obligations of that contract.

---

* A lease of real property is an executory contract per the definition found at §306(4) of the Bankruptcy Act [11 U.S.C. §706(4)].

> "...The right to priority in the event the trustee or debtor in possession receives benefits under the contract between the filing of the debtor's petition and the rejection of the contract 'is an equitable right based upon the reasonable value' of the benefits conferred rather than the contract price...." Id., 208 F.2d at 124.

Judge Babitt's order (Appellees' Appendix A) negates any conclusion that the debtor estate received any benefit. Middletown did not occupy the premises during the period, and the order required Middletown to turn over to the landlord the sub-rents for the period September 3 (the date of the Chapter XI) through September 23, 1974 (the return date of the application to disaffirm the lease).

Moreover, it has been repeatedly held that mere occupation by a sub-tenant of the debtor does not give rise to a claim for use and occupancy as an administrative priority claim. Irving Trust Co. v. Densmore, 66 F.2d 21, 25 (5th Cir. 1933); Meehan v. King, 54 F.2d 761, 763 (1st Cir. 1932).

Even if the trustee* collects rents from the sub-tenant, the trustee is not liable for use and occupation of the premises. In re United Cigar Stores Co. of America, 69 F.2d 513, 516 (2nd Cir. 1934), cert. denied sub nom. Reisenwebers, Inc. v. Irving Trust Co., 293 U.S. 566; In re McCrory Stores Corporation, 69 F.2d 517, 518 (2nd Cir. 1934);

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* See p. 9 of this brief equating a debtor in possession with a trustee in bankruptcy.

Central Manhattan Properties, Inc. v. D.A. Schulte, Inc. of New York, 91 F.2d 728 (2nd Cir. 1937), cert. denied 302 U.S. 743 (1937).

Judge Frankel properly concluded that "claim #3 should be disallowed, as occupation by a sub-lessee of a debtor is not to be construed as occupation by the debtor in possession".* Judge Frankel based his conclusion not only on the precedent of earlier cases cited above, but on two pronouncements of this court in Shopmen's Local Union No. 455 v. Kevin Steel Products, Inc., 519 F.2d 698 (2nd Cir. 1975) and Brotherhood of Railway Airline and Steam Clerks, Freight Handlers, Express and Station Employees, AFL-CIO v. REA Express, Inc., 523 F.2d 164, 170 (2nd Cir. 1975), cert. denied 96 S.Ct. 451 (1975), that "a debtor in possession under Chapter XI...is not the same entity as a pre-bankruptcy company."

Judge Frankel's decision in regard to Claim No. 3 filed against Middletown is clearly in accord with the prior decisions of this court and must therefore be affirmed.

POINT II

CLAIM NO. 2304 IN THE SUM OF $417,000, FILED AGAINST UNISHOPS AS THE GUARANTOR OF RENT ACCRUING FOR THE PERIOD SUBSEQUENT TO UNISHOPS' CHAPTER XI WAS PROPERLY DENIED PRIORITY STATUS

Landlord asserts that its Claim No. 2304 filed

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* Under Bankruptcy Act §342 (11 U.S.C. §742) the debtor in possession has all the title and exercises all the powers of a trustee in bankruptcy.

in the sum of $417,000 is entitled to priority under §64(a)(1) of the Bankruptcy Act [11 U.S.C. §104(a)(1)] as "costs and expenses of administration, including the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition...." The scope of "administration" priority was elucidated by Chief Judge Lumbard in American A. & B. Coal Corp. v. Leonardo Arrivabene, S.A., supra, 280 F.2d at 124:

> "The right to priority in Chapter XI proceedings is governed solely by §64 of the Bankruptcy Act. See §302, 11 U.S.C.A. § 702; 8 Collier on Bankruptcy Para. 5.33 (14th Ed. 1941). Section 64 sub. a(1) includes among those claims entitled to first priority 'the actual and necessary costs and expenses of preserving the estate subsequent to filing the petition' and 'the costs and expenses of administration'. The claim of a creditor having an executory contract with the debtor at the time the debtor's petition is filed is entitled to priority under these provisions only if the trustee or debtor in possession elects to assume the contract or if he receives benefits under it. The right to priority in the event the contract is assumed follows from the fact that the trustee or debtor in possession has elected to make the contract of the debtor his own, just as if it had been made by the trustee or debtor in possession in the first instance. The right to priority in the event the trustee or debtor in possession receives benefits under the contract during the interval between the filing of the debtor's petition and the rejection of the contract 'is an equitable right based upon the reasonable value' of the

> benefits conferred, rather than upon the contract price. In re United Cigar Stores Co., 2 Cir., 69 F.2d 513, 515, certiorari denied sub nom, Reisenwebers, Inc. v. Irving Trust Co., 1934, 293 U.S. 566, 55 S.Ct. 76, 79 L.Ed. 665; see Oscar Heineman Corp. v. Nat Levy & Co., 2 Cir., 1925, 6 F.2d 970, 43 A.L.R. 727; Gardner v. Gleason, 1 Cir., 1919, 259 F.755. Where no benefits are received by the bankrupt estate or its representative under the contract, and the contract is not assumed, the creditor's claim is not entitled to priority. Petition of Colburn, 1 Cir., 1926, 16 F.2d 780; In re No Care Elec. Radiator Corp., D.C.S.D.N.Y. 1933, 3 F.Supp. 331, although of course, upon rejection the creditor may file a general claim against the estate. See §§ 63, sub. a(9), 353, 11 U.S.C.A. §§ 103, Sub. a(9), 753."

Keeping in mind that the claim for which priority status is sought is based upon a guarantee, it must be noted that the claim can only be entitled to priority if the debtor in possession elected to assume the guarantee or if the debtor in possession received benefits under the guarantee.

THE DEBTOR IN POSSESSION DID NOT ASSUME THE GUARANTEE

A debtor in possession's option to assume or reject "executory contracts" does not extend to contracts such as guarantees under which the other party has fully rendered the performance to which the debtor in entitled. In re Grayson-Robinson Stores, Inc., 321 F.2d 500 (2nd Cir. 1963). The estate of Unishops received whatever benefit it could obtain from the landlord's performance with the continuation of Middletown's lease after landlord's purchase of the premises from White, and Unishops' rejection of the guarantee would neither add to

nor detract from the landlord's claim or the estate's liability. Assumption by Unishops as debtor in possession would in no way benefit the estate and would only have the effect of converting the claim into a first priority expense of administration and thus of preferring it over all claims not assumed. The Bankruptcy Act has not vested this prerogative in either the debtor in possession or the court. Vern Countryman, "Executory Contracts in Bankruptcy", Part I, 57 Minn. L. Rev. 439, 451-452 (1973).

A guarantee falls into this category of contracts which cannot be rejected.

> "...The guarantor, by the Lessor's execution of the lease, has received all of the consideration for which he bargained with the lessor. The contract between them is executed except for the guarantor's obligation to pay upon default of the lessee. By his 'rejection' the guarantor would be relinquishing no benefits; he would merely be repudiating his obligations. A guarantor is therefore no more entitled to reject his agreement of guaranty than would any bankrupt be entitled to 'reject' his accrued debts." In re Grayson-Robinson Stores, Inc., supra, 321 F. 2d at 502.

A surety contract falls into the same category:

> "In so far as [the contract of suretyship] was an executory contract it was a unilateral obligation to perform the same obligations the lessee had agreed to perform. In all other respects it was not executory at all but had been performed. Consequently, when the attempted rejection of it was made, there was nothing for the surety in reorganization to reject. What it did was simply a way of asserting a continued refusal to perform by one already in default. Nothing was

> thereby changed and no new rights arose. It is implicit in the language of the statute that a rejection of an executory contract involves the relinquishment of some right thought too burdensome to be retained and not merely the repudiation of an obligation which could in no circumstances ever be an asset to the debtor." In re Schulte Retail Stores Corp., 105 F.2d 986, 987-88 (2nd Cir. 1939).

Since the guarantee cannot be rejected, it likewise cannot be assumed. "[A] guaranty agreement [is] a complete obligation of payment, which became absolutely effective on the date of its execution." In the Matter of Wolf Rechtman, 11 F.Supp. 347, 350 (E.D.N.Y. 1935). This obligation cannot be repudiated and there is likewise no reason why the debtor in possession should assume it as an administration expense. Certainly such an assumption would not be in the ordinary course of the debtor's business and would accordingly require express court authorization. In re Avorn Dress Co., 79 F.2d 337 (2nd Cir. 1935). In the Avorn Dress case, the court held that a debtor in possession has no authority to borrow money without obtaining consent of the court.

> "As stated in our former opinion, 78F (2d) 681, a debtor continued in possession by court order is in a position analogous to that of a receiver in equity. The appellant concedes that the cases hold that parties dealing with a receiver act at their peril and courts, as a rule, refuse to recognize contracts made by a receiver outside the authority conferred upon him." Id., 79 F.2d at 337.

Likewise, a debtor in possession, were it its intention, cannot single out a general unsecured obligation for preferential treatment without obtaining express court approval.

Looking at this issue from another perspective, the only way it would be possible to find that Unishops as debtor in possession assumed the guarantee would be by considering the failure to "reject" the guarantee an assumption thereof. But since the Court of Appeals for the Second Circuit ruled in the Grayson-Robinson case, supra, that a guarantee could not be rejected, Unishops' failure to move against the guarantee cannot be considered an assumption of the guarantee by the debtor in possession.

The landlord contends (p. 24 of its brief) that (a) the debtor in possession has 60 days under §70(b) of the Bankruptcy Act [11 U.S.C. §110(b)] to elect to reject or assume an executory contract, and (b) having paid rent* for four months since the Chapter XI constitutes adoption of the guarantee. Landlord's first assumption is patently incorrect. A debtor in possession need not reject the executory contract within 60 days. Section 313(1) [11 U.S.C. §713 (1)] does not prescribe a fixed time limitation within

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* See "2" on p. 5, supra.

which the debtor must reject the lease [See In the Matter of The Bohack Corporation, Debtor, 2 Bankr. Ct. Dec. 396 (E.D.N.Y. 1976), copy of which opinion is annexed hereto as Appellees' Appendix B]. Moreover, this court's opinion in the Grayson-Robinson case, supra, dictates that a guarantee cannot be rejected. Furthermore, as previously indicated (pp. 13, 14 supra), an assumption could be accomplished only by an order of the Bankruptcy Court and not by inaction.

Landlord's other arguments are basically premised on the relationship of the guarantor and tenant. "We cannot divorce the parent from the subsidiary." (Appellant's Brief at p. 14.)

To support this contention, appellant states that, throughout the Chapter XI proceeding, consolidated statements were furnished to the court. This is irrelevant. In any event, the separate identity of Unishops and its subsidiaries is recognized in the decisions in this very case by the Bankruptcy Judge, District Judge Brieant and the Circuit Court. In In re Unishops, Inc., 491 F.2d 689 (2nd Cir. 1974), this court affirmed the decisions

below ruling that the Bankruptcy Court, which had jurisdiction over the person and property of Unishops, §311 of the Bankruptcy Act [11 U.S.C. §711], had no jurisdiction over Unishops' subsidiaries and could not enjoin proceedings against the subsidiaries. As noted in the per curiam decision:

> "...This court recently held, In re Beck Industries, Inc., 479 F.2d 410, 416 (2nd Cir. 1973), that the bankruptcy court cannot expand its jurisdiction over a debtor's subsidiary absent a showing that the subsidiary is a mere sham rather than a viable entity.
>
> "We agree with the position of the bankruptcy court and the district court...that...the subsidiaries cannot be characterized as shams in any real sense ...." 494 F.2d at 690."

There is no basis in the record to support a contrary determination. In fact, Facts ¶16 states that there has been no substantive consolidation of the estates of Unishops and Middletown.

THE DEBTOR IN POSSESSION DERIVED NO BENEFIT UNDER THE GUARANTEE

According to the landlord's argument,

Unishops as guarantor received the benefit of the undisturbed occupancy of Middletown (Appellant's Brief at pp. 4-5). This purported benefit, unsupported by the record*, is immaterial to a determination of benefit derived from the guarantee. As noted in the Grayson-Robinson decision, supra, 321 F.2d at 502:

> "It is of no consequence that this particular debtor may have an interest in the future performance by lessors. Such interest arises from the debtor's relationship to the lessees and is wholly irrelevant to the agreements of guaranty, which must be treated for purposes of the statute like any other such agreements.
>
> "Moreover, it has been held that when a lessee has rejected a lease, an agreement of guaranty of the lease is not an executory contract which the guarantor can reject. In re Schulte Retail Stores Corp., 105 F.2d 986 (2nd Cir. 1939); Hippodrome Bldg. Co. v. Irving Trust Co., 91 F.2d 753 (2nd Cir.), cert. denied, 302 U.S. 748, 58 S.Ct. 265, 82 L.Ed. 578 (1947); see 2 Remington, Bankruptcy 301 (Rev. Ed. 1956). Where, as in the present case, the lessees involved have all defaulted on their leases and the guarantor's liability has therefore attached, the situation may be considered analogous to that arising from the lessee's rejection."

Thus, not only has the Second Circuit ruled that no benefit

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* Claimant's memorandum makes numerous wild factual allegations. See pp. 4, 5, 6 supra.

accrues to a guarantor under the guarantee from a subsidiary's continued occupation, but it has stated that the situation is analogous to that of the lessee's rejection of the lease. Such a rejection gives rise to a general unsecured claim in the lessee's proceeding, and the landlord has indeed filed such a claim*.

Furthermore, a factual analysis based on the record before the court shows no apparent benefit to Unishops as debtor in possession from the lease. The supposed benefit to Middletown was its right to collect rents from sub-tenants and conduct business, which in fact meant the running of a going-out-of-business sale in March of 1974 (Facts ¶13 and letter exhibit). Any monetary benefit to Middletown is questionable, and there is no basis to suspect a monetary benefit to Middletown's parent, White, or to White's parent, Unishops.

Indeed if any benefit accrued to the guarantor as the result of the subsidiary's possession of the premises, it arose not because of the guarantee but because of the guarantor's relationship to the tenant, a parent-subsidiary relationship.**

There is no legal basis for holding that Claim

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* Claimant filed Claim No. 4 in the sum of $417,000.47 as a general claim against the estate of Middletown, which claim is not covered by this appeal.

** See note on page 6, supra.

No. 2304 filed against Unishops is entitled to priority status as an administration expense, and the order finding such claim to be a general claim must be affirmed.

CONCLUSION

FOR THE FOREGOING REASONS, THE APPEAL OF 143 ESTATES, INC., LANDLORD, SHOULD BE DISMISSED AND THE ORDER OF THE DISTRICT COURT AFFIRMED.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN THE MATTER OF UNISHOPS, INC., UNISHOPS OF STARS, INC., UNISHOPS OF MODELL'S, INC., UNISHOPS OF CLARKINS, INC.,also d/b/a CLARK WHOLESALE CO., GOLDFINE'S INC., also d/b/a GOLDFINE'S "BY THE BRIDGE", NESCOTT, INC., TERIL STATIONERS, INC., J.Z. SALES CORP., CENTRAL TEXTILE,INC., formerly known as UNISHOPS OF CENTRAL TEXTILE, INC., BOBBIE SUE, INC., also d/b/a FAMOUS FASHIONS, PERRY'S SHOES, INC., also d/b/a PIC 'N SHOE, WHITE DEPARTMENT STORES, INC., formerly known as WHITE AT MASSAPEQUA, INC., UNIQUIP, INC., UNISHOPS OF GIANT AUTOMOTIVE, INC., SICKELS-LODER, INC., MODELL'S SHOPPERS WORLD OF TRENTON,INC. CLARKINS AT YOUNGSTOWN, INC., MODELL'S SHOPPERS WORLD OF EAST BRUNSWICK, INC. MIDDLETOWN CENTER, INC., WHITE SHOPPING CENTER, INC., Debtors.	In Proceedings For An Arrangement No. 73 B 1208 ORDER REJECTING AND DISAFFIRMING LEASE

At New York, New York, in said District, on the 3rd day of October, 1974.

The debtors in possession having moved for an order

pursuant to §313(1) of the Bankruptcy Act to reject and disaffirm a certain lease, and a hearing on said motion having regularly come on to be heard before me on September 23, 1974,

NOW, upon reading and filing the notice of motion and application of the debtors in possession dated September 6, 1974, and the affidavit of service thereon, submitted in support of said motion, and the affidavit of Stephen H. Shane, sworn to September 20, 1974, in opposition thereto, and after hearing LEVIN & WEINTRAUB, attorneys for the debtors in possession, in support of the motion, and DEMOV, MORRIS, LEVIN & SHEIN, attorneys for lessor, in oppposition thereto, and the Court having found that said lease is onerous and burdensome to the debtors in possession, and upon the minutes taken before me,

NOW, on motion of LEVIN & WEINTRAUB, attorneys for the debtors in possession, it is

ORDERED, that pursuant to §313(1) of the Bankruptcy Act, the lease set forth in the annexed schedule be and it hereby is rejected and disaffirmed, and it is further

ORDERED, that the lessor shall file any claims that it may have arising out of said disaffirmance within sixty (60) days of service of a copy of this order upon it with notice of entry without prejudice to the right of the debtors to object thereto, and it is further

ORDERED, that any sub-lessees of the subject premises be and they hereby are relieved of their obligation to make all future rental payments to the debtor in possession and are directed

to make all such payments directly to the landlord, Benjamin Miller, c/o Urban Management, 111 Broadway, New York, New York, and it is further

ORDERED, that the debtors in possession be and they hereby are directed to pay over to the landlord any and all rent received from such sub-lessees subsequent to the filing of the Chapter XI petition hereon on September 3, 1974.

s/ ROY BABITT
Bankruptcy Judge

(Cite as 2 Bankr. Ct. Dec. 396)

In the Matter of THE BOHACK CORPORATION
Debtor
Bankruptcy No. 74-B-933

against

STALTAC ASSOCIATES, et al
Respondent

E.D. New York
March 19, 1976

Some time prior to filing Chapter XI petition debtor entered into two leases for periods of 21 years and 28 years with respondents. Approximately three months after filing Chapter XI petition debtor moved pursuant to Sec. 313(1) for order permitting rejection of unexpired leases. On contention of respondents that rejection of lease must be exercised within reasonable period of time and that failure of debtor to indicate that it intended to cease business at lease locations constituted tacit affirmation and adoption of leases, *HELD*, Sec. 313(1) did not prescribe a fixed time limitation in which the debtor must reject a contract. Landlord may move for court to have lease assumed or rejected and if he fails to do so he cannot presume that by mere passage of time lease is deemed affirmed. Onus is upon landlord to clarify his status in court.

C. ALBERT PARENTE, Bankruptcy Judge

DECISION

The issue presented focuses upon the right of a debtor-in-possession to reject an executory contract.

[2] A synoptic review of the uncontroverted facts follows:

The Bohack Corporation (hereafter 'D.I.P.') on July 30, 1974 filed a petition, pursuant to Chapter XI of the Bankruptcy Act, for an arrangement with its creditors. Antecedent thereto and on December 28, 1959, and on October 16, 1969, the D.I.P. leased from Staltac Associates and Johmab Rental (hereafter 'Respondent') premises identified as Store No. 2347 situated on Sunrise Highway, Bohemia, New York, and Store No. 2220 situated in Hampton Bays, New York, for terms of 21 years and 28 years, respectively.

There being a comity of ownership interest the subject proceedings were consolidated. Constant herewith, the word 'Respondent' shall apply in the plural.

At or about October 30, 1975, the D.I.P moved, under Sec. 313 (1) of the Bankruptcy Act, as amended, for an order permitting a rejection of the aforesaid unexpired leases.

The thrust of Respondent's contention is anchored to the concept that rejection of a lease must be exercised within [3] a "reasonable" period of time after the filing of a petition under Chapter XI. In comport with such premise, Respondent argues that the D.I.P.'s continued post-filing possession and operation of the store premises for a period of approximately fifteen months, coordinate with D.I.P.'s failure to advise the Respondent or otherwise divulge its intentions to cease doing business at the subject locations, constituted a tacit affirmation and adoption of the leases.

In diametric posture, the D.I.P. demurs to Respondent's postulate characterizing same as a generalized conclusion bereft of any viable basis in law. The D.I.P. takes the position that it is statutorily endowed with an unfettered right, timewise, to reject an executory contract upon a proper showing that the contract is onerous, burdensome and a peril to the D.I.P.'s rehabilitative endeavor.

It is axiomatic that the Bankruptcy Court may permit the rejection of an executory contract. The Bankruptcy Act provides two modes of rejection; viz., (a) rejection may be effectuated pursuant to the proviso of Sec. 313 (1) of the Bankruptcy Act, Rule 11-53, or (b) rejection may be accomplished [4] pursuant to the proviso of Sec. 357 (2) wherein the plan of arrangement provides for the rejection of an executory contract. In context said statutes contain the language following:

Sec. 313 of the Bankruptcy Act states –

> "Upon the filing of a petition, the Court may, in addition to the jurisdiction, powers, and duties hereinabove and elsewhere in this chapter conferred and imposed upon it -
>
> (1) permit the rejection of executory contracts of the debtor, upon notice to the parties to such contracts and to such other parties in interest as the Court may designate."

Sec. 357 of the Bankruptcy Act states –

> "An arrangement made within the meaning of this chapter may include -
>
> (2) provisions for the rejection of any executory contract."

We are here concerned with Sec. 313 (1) in light of the fact that a plan of arrangement has not at this juncture been filed. Section 313 (1) palpably does not prescribe, contain or impose a fixed time limitation by when the debtor must reject the contract. This differs from straight bankruptcy wherein the Trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thrity days after the qualification of [5] a Trustee, whichever is later, but the Court may for cause shown extend or reduce the time. Any such contract or lease, not assumed or rejected within that time, shall be deemed to be rejected (Sec. 70b of the Bankruptcy Act).

(Cite as: Bankr. Ct. Dec. 397)

Respondent's ratiocination, albeit appealing and adroitly argued, is nevertheless clothed in misconjecture. The Court cannot impose a time imperative or criteria for the acceptance or rejection of a lease by the D.I.P. Such action would clearly violate the mandate of Sec. 313 (1) and undermine the legislative intent. Judicial restraint has long been recognized as an unwritten canon of law. Apropos thereof, Mr. Justice Benjamin Cardozo effectively articulated the doctrine by stating:

> "A jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own ideal of beauty or goodness."

Adverting to the cases proffered by the Respondent as supportive of its contention, in analysis the Court finds that they are not responsive to the issue. In re *Chase Commissary Corporation*, 11 F. Supp. 288 (S.D. N.Y., 1935) relates to [6]a pre-Chandler Act case filed under Sec. 77B of the Bankruptcy Act. A reading thereof elicits no basis of compatibility to the case at bar. The Court in dispositive essence held:

> "that a lease is an asset of the estate. The estate is not automatically liable for the rent stipulated in the lease. A reasonable period for adoption or rejection is allowed. If the lease be adopted, the estate is liable for the fixed rent without interruption. If rejected, then the estate is liable for the period of use and occupation on a reasonable basis, which is presumptively measured by the rent reserved in the lease."

The citing of In the matter of *American Anthracite and Bituminous Coal Corp.*, debtor, 171 F. Supp. 377 (S.D. N.Y., 1959) perplexes the Court since it is implicitly inapt and, in fact, contravenes Respondent's contention. The Court therein punctuates the governing maxim of law in the language following:

> "Assumption or adoption of the contracts can only be effected through an express order of a Judge."

Moreover, the definitive issue concerning the Court pertained to whether certain claimants could assert a right of priority status.

[7]It is to be noted, however, that a landlord is not left without remedy. He can move the Court to have his lease assumed or rejected. A landlord who fails to affirmatively act or protest cannot presume that by the mere passage of time the lease is deemed affirmed. The onus is placed upon the landlord to clarify his status through the auspices of the Court .. In re *Mohonk Realty Corp. v. Wise Shoe Stores, Inc.*, 42 Am. Br. (N.S. 375, 382); 111 F. 2d, 287, 290.

In context with the above findings and after a hearing on the merits, the Court concludes that the D.I.P. met its burden of proof establishing the subject leases as onerous and burdensome.

ACCORDINGLY, the Court grants judgment in favor of the D.I.P. permitting the rejection of the leases in issue.

A 202 Affidavit of Personal Service of Papers LUTZ APPELLATE PRINTERS, INC.

united states court of appeals
forf the second circuit

UNISHOPS INC., MIDDLETOWN CENTER, INC., Debtors. 143 ESTATES INC., Appellant, *- against -* UNISH OPS INC., MIDDLETOWN CENTER INC., Appellee,.	*Index No.* *Affidavit of Personal Service*

STATE OF NEW YORK, COUNTY OF NEW YORK *ss.:*

I, Reuben A. Shearer *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 211 West 144th Street, New York, New York 10030

That on the 3 *day of* June *19*76 *at* 450 Seventh Avenue, New York, New York

deponent served the annexed Brief *upon*

Ruben Schwartz & Silverberg Esqs.
the Attorneys *in this action by delivering a true copy thereof to said individual personally. Deponent knew the person so served to be the person mentioned and described in said papers as the herein,*

Sworn to before me, this 3
day of June *19* 76

Reuben Shearer
Reuben Shearer

ROBERT T. BRIN
NOTARY PUBLIC, State of New York
No. 31-0418950
Qualified in New York County
Commission Expires March 30, 1977